Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1998

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IN RE GLEN MARCUS FALLIN and ROBERT DICARLO

Petitioners,

_____□_____

On Petition for a Writ of Mandamus or, in the alternative, Petition for Writ of Certiorari To the United States Court of Appeals For the Fourth Circuit

_____□_____

PETITION FOR WRIT OF MANDAMUS or, in the Alternative, WRIT OF CERTIORARI

_____□_____

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QUESTIONS FOR REVIEW

1. Whether a federal district court may institute a requirement that attorneys whom it has permanently admitted to practice before it shall "apply" to "renew" their admission without promulgating a local rule, within the meaning of F.R.Civ.P. 83, in compliance with the respective requirements of 28 U.S.C. § 2071(b) (notice to the public and opportunity for public comment) and 28 U.S.C. § 2077(b) (appointment of "advisory committee for the study of the rules of practice and internal operating procedures").

2. Whether a district court's local "rule" requiring admitted attorneys to demonstrate anew their fitness to practice in order to "renew" their admission affects a substantive right and therefore is violative of 28 U.S.C. 28 U.S.C. 2072(b), as made applicable to the district courts' rule-making process by 28 U.S.C. § 322(d)(4). [1]

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[1] This question was not articulated in the initial, nonconforming Petition filed herein, but argument was presented, under an appropriate heading, in the initial Petition at 12-15, that squarely addressed this issue.

If the court deems this question as unavailable to Petitioners, they ask that the court disregard Question 2 above, and the Argument heading within the body of the corrected petition, but consider the textual argument as part of Argument 1.

3. Whether an attorney enjoys a property interest in his admission to the District Court that is protected by the Fifth Amendment and thus cannot be lawfully extinguished without notice of any purported reasons for terminating his admission and a meaningful opportunity for rebuttal.

4. Whether a writ of mandamus should issue to correct the district court's refusal - evidently in bad faith -- to recognize a notice of voluntary dismissal without prejudice filed pursuant to F.R.Civ.P. 41(a)(1)(i) prior to the filing of an answer and after the district court had expressly applied the standard provided by F.R.Civ.)P. 12(b)(6) for motions to dismiss to determine "Defendants' Motion to Dismiss, or, in the alternative, Motion for Summary Judgment".

List of Parties to the Proceedings in the Court Below

1. Petitioner Glen Marcus Fallin (Petitioner and Appellant below)

2. Petitioner Robert DiCarlo (Petitioner below)

3. Respondent: U.S. District Court for the District of Maryland and Chief Judge J. Frederick Motz (Appellees and Respondents below)

4. Respondent Baltimore County, MD (Respondent below)

5. Respondent Wesley P. Martin (Respondent below)

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In re Glen Marcus Fallin and Robert DiCarlo, 1998 WL 225140 (4th Cir.(Md.)).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourth Circuit issued on June 18, 1998, the opinion that Petitions ask this court to review. That opinion denies mandamus relief for both Petitioners and dismisses as premature Petitioner Fallin's alternative appeal. This Court has certiorari jurisdiction on the basis of 28 U.S.C. Sec. 1254(1) and jurisdiction for granting mandamus relief pursuant to 28 U.S.C. § 1651.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED IN THE CASE

1. Fifth Amendment, U.S. Constitution.

2. Title 28, U.S.C., §§ 332, 2071, 2072, 2075, 2077.

3. F.R.Civ.P. 12(b)(6), 41(a)(1)(i), 83.

Statement of the Case

By order dated May 7, 1997, the name of Petitioner Fallin was stricken from the rolls of attorneys admitted to practice in the U.S. District Court for the District of Maryland ("the district court") because he had failed to submit an "application" to "renew" his admission as instructed by a letter from the Clerk.

On June 13, 1997, Petitioner Fallin filed a petition for writ of mandamus in the U.S. Court of Appeals for the Fourth Circuit to challenge the termination of his 19-year admission to the district court. Petitioner DiCarlo, Plaintiff in *DiCarlo v. Baltimore County, MD, et al.*, Civil Action MJG-95-556 in the district court, joined to seek mandamus relief for the district court's "deni[al]" on February 24, 1997, of a F.R.Civ.P. 41(a)(1)(i) notice of voluntary dismissal ("NVD"). The NVD was filed prior to the filing of an answer by the Defendants and after the district court had expressly applied the standard for F.R.Civ.P. 12(b)(6) motions to determine the Defendants' paper styled "Motion to Dismiss or, in the alternative, Motion for Summary Judgment". As Plaintiff had urged, the district court did not rely on an affidavit and copy of Plaintiff's letter of resignation from the employment from which his claims

rose, because the affidavit and letter in no way controverted the averments of the complaint.

In a one-paragraph, per curiam order filed June 18, 1998 [1997], [1] the Fourth Circuit denied all relief, without any specific mention of the circumstances that had prompted Petitioner DiCarlo to seek extraordinary relief. As for Petitioner Fallin, the Fourth Circuit stated that mandamus relief was not warranted and the alternative appeal was interlocutory and thus impermissible, since Petitioner Fallin could proceed to file a renewal application. Because the order, although directed to Petitioner Fallin's correct address, was not received until on or after July 4, 1998, a petition for reconsideration or rehearing was not filed.

Statement of facts.

After receiving the district court's May 7, 1997, order terminating his admission, Petitioner Fallin inquired further and learned that the Chief Judge of the district court, Hon. J. Frederick Motz, had written a letter dated April 9, 1997, [2]

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[1] Since it would clearly disserve this court to allow nonsubstantive errors that appeared in the initial, nonconforming brief, Petitioners are making corrections and identifying them by using ***bold italic*** print and [~~striking out~~] the superseded material.

[2] ***The verified petition for writ of mandamus, at ¶ 4, A. 10, states that Judge Motz' letter was dated April 15, 1997, but April 9, 1997, is the correct date, based on the actual***

to inform him that his admission to the court would be terminated if he failed to submit the renewal application within 15 days. That letter was not received by Petitioner Fallin until he made inquiry, on May 13, 1997, the date of his actual receipt of the May 7 order.

Petitioner Fallin immediately wrote to Chief Judge Motz and stated that he had not received the April 9 letter and asked that he be allowed an additional 15 days in which to decide whether or not to submit the renewal application. The response was a telephone call from the Chief Judge's secretary advising Petitioner Fallin that the order terminating his admission to the court would be stricken upon his submission of a renewal application.

Rather than submit a renewal application, Petitioner Fallin elected to file the petition for writ of mandamus with the Fourth Circuit, which was styled alternatively as a notice of appeal and to which Petitioner DiCarlo's request solely for mandamus relief was joined, as noted *supra*.

On July 23, 1997, Chief Judge Motz transmitted to the Clerk of the Fourth Circuit a copy of a letter to Petitioner Fallin, dated May 27, 1997, in which he stated as follows:

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letter in Petitioner Fallin's possession. The difference in dates is immaterial.

> Reference is made to your letter of May 13, 1997.
>
> I had understood that you would be filing a request for reinstatement to the bar which would moot the matters set forth in your letter. You have not yet done so. If you wish to be a member of the bar of this court, you must submit a petition for reinstatement and pay the appropriate fee. Whether or not the petition will be granted will be decided in the ordinary course.

As noted in the mandamus petition, the district court adopted the "new policy" without promulgating a Local Rule to authorize the policy and evidently without even publishing an order concerning the policy. Subsequent to the filing of the mandamus petition below, the district court published a notice in The Daily Record, a legal newspaper published in Baltimore, saying that the court had "amended Local Rule 701.2, ADMISSION PROCEDURE, on an emergency basis. The amendment is effective July 1, 1997." The notice states further:

> The amendment creates a new designation for the present paragraph of the rule and adds a new second paragraph entitled "RENEWAL APPLICATIONS." Copies of this rule change are available for distribution in the clerk's office or they may be requested by writing to the Clerk, U.S. District Court, Room 4415 U.S. Courthouse, 101 West Lombard Street, Baltimore, Md. 21201.

As Petitioner Fallin noted in the mandamus petition, as of the time of termination of his admission to the district court, the court had never provided notice to the public of the institution of the renewal requirement, and no opportunity for public comment was ever provided. Also, the district court evidently has never appointed an advisory committee for study of the rules and internal operating procedures. [3]

The district court's rejection of the notice of voluntary dismissal filed on behalf of Petitioner DiCarlo's on February
24, 1997, was the second such action by the court. An earlier NVD also had been "denied" by ***the presiding Judge, Hon. Marvin J. Garbis***, who also had refused to allow the Clerk to accept the latter paper for filing, and the earlier NVD was never entered on the docket. [4] When the

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[3] Also, subsequent to the filing of the mandamus petition, Petitioner Fallin inquired informally to the Administrative Office of the U.S. Courts and with the Fourth Circuit Council and was informed that the district court had not filed there the requisite copies of the newly promulgated local rules. A later inquiry indicated that these filings were effected, but some months after the local rule here in question became effective.

[4] Subsequent to the initial of the instant petition, another incident occurred in which a F.R.Civ.P. 41(a)(1)(i) notice of voluntary dismissal was presented to the Clerk for filing,

second NVD was "denied", Judge Garbis also issued an order directing Petitioner Fallin to show cause why he should not be sanctioned, held in contempt, and/or referred to the court's Disciplinary Committee. Without exception, Judge Garbis always referred to the Defendants' motion simply as a "motion for summary judgment" and in the court's memorandum explicating the show cause order Judge Garbis rebuked Petitioner Fallin for filing the NVD frivolously and in violation of the bar against filing NVDs after the "filing" of a motion for summary judgment.

The show cause order remains unresolved as of this writing, although Judge Garbis dismissed the case with prejudice on September 15, 1997, after Petitioner DiCarlo reported that he was unable to retain other counsel -- after the termination of Petitioner Fallin's admission to the court -- and was not competent to represent himself. In lieu of

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but instead of being filed immediately was directed to Judge Garbis' chambers. The NVD was "approved" a week later, but the date of entry of the NVD on the docket, initially, was the date the clerk received the NVD from chambers, rather than the date on which the NVD was presented for filing. The Clerk's explanation for this episode was that all NVD's received in the USDC for Maryland are directed to the judge presiding in the case in which the NVD is filed, for the judge to determine whether to accept or reject the NVD. Obviously such a practice

making the election demanded by the district court, Petitioner DiCarlo had requested that Judge Garbis stay the action pending disposition of the mandamus petition by the Fourth Circuit.

As of July 29, 1999, Petitioner DiCarlo's appeal ***was awaiting the scheduling of oral argument*** ~~awaits the filing of Appellant's Brief~~, after the Fourth Circuit refused to rule summarily that the second notice of voluntary dismissal was effective to terminate the proceedings in the district court. Petitioner DiCarlo sought summary relief in view of the failure of Respondents Baltimore County and Martin to cite a single authority or otherwise argue in support of the district court's "denial" of the NVD on February 24, 1997. [5]

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would allow a defendant to file an answer *after* an NVD is presented for filing and still defeat the NVD.

[5] The *DiCarlo* Respondents also failed to make any attempt to distinguish *In re Wolf*, 842 F.2d 464 (D.C. Cir. 1988) -- the authority cited by Petitioners for the proposition that mandamus relief was appropriate for the district court's refusal to heed the NVD.

ARGUMENT

1. The District Court's termination of Petitioner Fallin's admission to the court was effected pursuant to a "rule" promulgated in violation of 28 U.S.C. 2071(b) and 2077(b) and therefore should be nullified.

The legal standards that apply to District Courts' rule-making cannot be ignored with impunity. The "policy" referred to in Exhibit 1 -- the letter to Petitioner Fallin from the Clerk -- must be construed as a "rule" within the contemplation of Section 2071(f): "No rule may be prescribed by a District Court other than under this section." *Cf., Brown v. Crawford County, GA*, 960 F.2d 1002, 1009 n. 8 (11th Cir. 1992): [6]

> Although not called local rules, the local "procedures" instituted by two judges in the Middle District of Georgia govern the civil procedure of practitioners before these judges. We stress that the name given to local procedures is irrelevant. *If the purpose of such local procedures, practices or policies is to control practice in a District Court in this circuit, such*

[6] In *Brown*, relief was sought via an appeal, rather than a petition for *writ of mandamus*, and the issue of the propriety of the two judges' local "rules" was raised initially in oral argument and then, at the request of the Eleventh Circuit panel, supplementally briefed by the parties. Thus, *Brown* cannot be read as militating against *mandamus* relief.

> *procedures effectively are local rules and must be created in accordance with Rule 83.* [Italics supplied.]

Thus, applying the above-quoted holding to the instant proceedings would mean that, even if it were concluded that the District Court here could promulgate a "policy" on attorney admissions that was not included in the court's formally promulgated local rules, that "policy" would still have to meet the same standards as the local rules: compliance with F.R.Civ.P. 83 by providing for public notice and an opportunity to comment and consistency with "Acts of Congress and rules adopted under 28 U.S.C. §§ 2072 and 2075".

Manifestly, the "policy" under which undersigned Petitioner's admission to the District Court was terminated was effectively a "rule", and it did not comply with F.R.Civ.P. 83, or with 28 U.S.C. § 2071(b). Nor was there compliance with § 2077(b), because there was not and could not have been any involvement by a nonexistent advisory committee, and Local Rule 605 makes no mention of any involvement by an advisory committee in the promulgation of rules and amendments.

The District Court's total noncompliance with F.R.Civ.P. 83 and 28 U.S.C. 2071-2077 should result in the

withdrawal or rescission of its "policy" and post-July 1, 1997, Local Rule, 701.2.b requiring admitted attorneys to file applications for "renewal" of their admission. The court has defaulted procedurally, as is evidence by the lack of awareness of both undersigned Petitioner and the president of the Federal Bar Association concerning the "renewal" requirement, and its policy and subsequent Local Rule clearly abridge a "substantive" right, i.e., the right of an attorney, once admitted to the district, to continue to be admitted to that court absent notice and an opportunity for the attorney to be heard in opposition to any purported reason to suspend or terminate his admission.

In *Baylson v. The Disciplinary Board of the Supreme Court of Pa.*, 764 F.Supp. 328, 336 (E.D.Pa. 1991), the court, drawing from *Tiedel v. Northwestern Michigan College*, 865 F.2d 88, 91 (6th Cir. 1988), ruled precisely as urged *supra*:

> The putative revisions [in the Local Rules of the U.S. District Court for the – of Pennsylvania] share two defects. First, *the district courts did not utilize advisory committees at any stage in promulgating the amendments.* Second, *the notices distributed by the districts did not solicit comment* or explain *where, how, or when interested individuals could be heard regarding the deletion of Rule 3.10 from the local rules.* [Italics supplied.] With the exception of the Western District's Order of March 21, the notices

> also give every impression that the Courts were simply announcing their final decisions, rather than inviting input. That no individuals (apart from the United States Attorneys) and only one organization in the entire Commonwealth submitted comment about the amendments confirms this conclusion. Nor does the Court find persuasive the plaintiffs' argument that discussion of the attorney subpoena controversy at a Bench Bar conference satisfied the Eastern District's statutory obligation to afford notice and an opportunity to comment. Undoubtedly, a properly announced, open meeting between judges and interested individuals to debate the merits of a particular rule would discharge section 2071(a)'s notice and comment requirement. In this case, however, there is no evidence that the agenda of the Bench Bar conference was adequately noticed, or that the public or even all interested lawyers in the District were invited to attend the discussion. Accordingly, *the three amendments are invalid.* ***[Italics added.]***

Moreover, in *Baylson*, there obviously was *some* discussion of the rule changes among members of the bench and bar; at issue as a State disciplinary rule requiring prosecutors to secure judicial approval prior to issuing subpoenas to lawyers to compel them to testify about their clients. Here, evidently there was none whatsoever outside of the judges of the District Court.

2. The District Court's termination of Petitioner Fallin's admission to the court violated 28 U.S.C. 2072(b), as made applicable to the District Court's rule-making process by 28 U.S.C. § 332(d)(4).

Section 332(d)(4) of Title 28 mandates that the Judicial Council of each circuit review each rule prescribed by each District Court pursuant to Section 2071 "for consistency with rules prescribed under section 2072 of this title. Each council may modify or abrogate any such rule found inconsistent in the course of such a review." Section 2072 governs the Supreme Court's promulgation *inter alia* of "general rules of practice and procedure", and in subsection (b) the Supreme Court's rule-making power is restricted so that "[s]uch rules shall not *abridge, enlarge or modify any substantive right.*" [Italics supplied.] Manifestly, an attorney's right to practice before a particular court is a *substantive* right. *A fortiori*, if the Supreme Court is prohibited from making rules that so affect "any substantive right", surely the District Courts are similarly constrained; for a District Court rule that did affect a substantive right would not be consistent with the rules promulgated by the Supreme Court pursuant to § 2072. Put another way, a rule prescribed by a district or circuit court that purports to abridge a substantive right, such as an attorney's previously conferred right to practice before a

particular court, would necessarily be inconsistent with rules prescribed by the Supreme Court in deference to the constraint imposed by § 2072(b).

A District Court's rule-making is constrained also by F.R.Civ.P. 83(a), which similarly provides that local rules "shall be consistent with . . . Acts of Congress" -- obviously including Section 2072(b) -- "and rules adopted under 28 U.S.C. §§ 2072 and 2075". It therefore follows that Respondents' reliance below on F.R.Civ.P. 83(b), in their response filed herein on March 23, 1998, is misplaced. Rule 83(b) prohibits the imposition without "actual notice" of a "sanction or other disadvantage . . . for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement." Thus, as ***the DiCarlo*** Respondents would apply it, Rule 83(b) would allow literally any requirement to be imposed, regardless of its conformity vel non to constitutional and statutory standards, so long as there was "actual notice". Respondents' position is absurd.

3. Petitioner Fallin enjoyed a property interest in his admission to the District Court that was protected by the Fifth Amendment and thus could not be extinguished without notice of any purported reasons for terminating his admission and a meaningful opportunity for rebuttal.

Admission in the first instance to practice before the District Court "'is not a matter of grace, but of right for one who is qualified [for such admission] by his learning and his moral character'". *In Re G.L.S.*, 745 F.2d 856, 859 (4th Cir. 1984), quoting from *Baird v. State Bar of Arizona*, 401 U.S. 1, 8, 27 L. Ed. 2d 639, 91 S. Ct. 702 (1971). But of course the attorney has the burden initially of demonstrating her fitness for admission.

Once an attorney has been admitted to practice, his status cannot properly be altered without at least a *prima facie* showing that there is reason to believe he or she is not to continue in that status.

This court, in *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 377-79, 18 L.Ed. 366 (1867) (citations omitted)), stated as follows (as quoted in *Attorney General of Maryland v. Waldron*, 289 Md. 683, 702-703, 426 A.2d 929, 939-940 (1981)):

> [Attorneys] are officers of the court; admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character... The order of admission is the

> judgment of the court that the parties possess the requisite qualifications as attorneys and counselors, and are entitled to appear as such and conduct causes therein. From its entry the parties become officers of the court, and are responsible to it for professional misconduct. *They hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment* ***940** *of the court after opportunity to be heard has been afforded.* [Italics supplied.]
>
> * * *
>
> The attorney and counselor being, by the solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the Legislature. It is a right of which he can only be deprived by the judgment of *703 the court, for moral or professional delinquency. —

Thus, shifting to Petitioner Fallin the burden of demonstrating anew his fitness for admission to the court, as a matter of the District Court's routine practice and without any showing that identifies any act or omission by Petitioner Fallin ***that*** is being or may be considered as disqualifying him from practice in that court, is irreconcilable with the above-quoted authorities. This wrong is exacerbated by the circumstances that here attach: the District Court has never announced or published its

criteria for considering such "renewal" applications, and Petitioner Fallin has been the target of a series of show cause orders by the Hon. Marvin J. Garbis, U.S. District Judge a member of the District Court's Admissions Committee, of which four remain "pending" and thus unappealable and the other of which may be deemed "pending" because it is addressed in Appeal No. 97-2425 ***(before the Fourth Circuit)***. These circumstances are further exacerbated by the hostility of Judge Garbis toward Petitioner Fallin, as demonstrated by the five show cause orders and his directing the Clerk not to accept for filing a notice of voluntary dismissal in the case of *DiCarlo v. Baltimore Co., et al.*, C/A No. MJG-95-556. [7]

In accordance with the above argument is the ***Fourth Circuit's*** [~~this court's~~] decision in *In re Evans*, 801 F.2d 703 (4th Cir. 1986), noting, at 704, in which the court concluded that there were "no procedural irregularities in the conduct of the disbarment proceedings below" where "Evans was certainly given adequate notice of the charges against him" and Evans had waived any right to a hearing

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[7] This action by Judge Garbis has been referred to several times in papers subsequently filed in the district court, and Judge Garbis has never denied it or otherwise referred to it in any way. Petitioner Fallin was orally advised of the action by the Clerk's office in the district court.

that he enjoyed by failing to request a hearing. *Cf., In the Matter of Jones*, 506 F.2d 527 (8th Cir. 1974), holding that even an attorney convicted of a felony is entitled to notice and an opportunity to be heard prior to disbarment; *United States v. Cooper*, 675 F.Supp. 753 (D.R.I. 1987), holding that termination of a *pro hac vice* admission may require "some type" of hearing, although such status lacks constitutional protections, as concluded in *Leis v. Flynt*, 439 U.S. 438, 99 S.Ct. 698, 58 L.Ed.2d 717 (1979); *Barnes v. Walsh*, 145 Me. 107, 111, 72 A.2d 813 (Sup.Jud. Ct. of Me. 1950), recognizing that inherent power of court to discipline attorneys:

> is limited . . . only by the general principles of law which require that sufficient notice be given to the respondent to enable him to appear and defend against the charges, that it afford to him a fair and impartial hearing upon the charges made against him, and that discipline be or removal ordered only for misconduct ascertained by the Court in proceedings so conducted.

Here, Petitioner Fallin received notice of the actual termination of his admission *after* the termination had been effected by the court, and the only ***prior*** notice was the letter of the Clerk that of course cited no reason for the requirement that undersigned Petitioner apply to renew his admission and no authority -- no Local Rule and no

published order of the District Court -- for imposing this requirement. [8]

Petitioner Fallin does ***not*** mean to suggest, of course, that a district court cannot properly require that information relevant to an attorney's continued admission be submitted from time to time. What is decried here is the burdening of Petitioner Fallin with the risk of nonpersuasion in the absence of any question about his competence and character.

4. A writ of mandamus should issue to correct the district court's refusal to recognize a notice of voluntary dismissal without prejudice filed pursuant to F.R.Civ.P. 41(a)(1)(I) prior to the filing of an answer and after the district court had expressly applied the standard provided by F.R.Civ.P. 12(b)(6) to determine "Defendants' Motion to Dismiss, or, in the alternative, Motion for Summary Judgment".

Without discussing the appropriate mode of relief, it is crystal clear that Petitioner DiCarlo is entitled to relief *in some form* that vindicates the F.R.Civ.P. 41(a)(1)(i) notice filed below. Respondents do not contend otherwise in their

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[8] Undersigned Petitioner was informed by the Clerk's Office that by means of the same practice that was applied to him, Virginia attorneys admitted to the district court were subjected to the summary termination of their admissions, without opportunity to renew their admissions, because their "home" court(s) did not engage in reciprocity with the Maryland district court in attorney admissions.

response filed March 23, 1998. Petitioner DiCarlo submits that ***the Fourth Circuit's*** [~~this court's~~] recent holding in *Finley Lines Joint Protective Board Unit 200 v. Norfolk Southern* Corporation, 109 F.3d 993, 154 L.R.R.M. (BNA) 2940, 37 Fed.R.Serv.3d 413 (4th Cir. 1997), forecloses the question of his entitlement, *vel non*, to relief:

> We cannot embrace this interpretation, however, because it is at odds with the language and intent of Rule 12(b)(6), our decision in Wilson-Cook Med. Inc. v. Wilson, 942 F.2d 247 (4th Cir.1991), and the better reasoned out-of-circuit precedent.
>
> First, and most obviously, the plain language of the rule does not permit conversion upon service. Rule 12(b)(6) does not provide that a motion to dismiss supported by materials outside the pleadings shall be treated as one for summary judgment when "filed" with the court or when "served" on a party. Rather, the rule expressly states that a motion to dismiss supported by such materials "shall be treated" as a summary judgment motion only when the materials are "presented to and not excluded by the district court." *996 Fed.R.Civ.P. 12(b)(6). This language can only mean, as Professor Moore has concluded, that the "mere submission [or service] of extraneous materials does not by itself convert a Rule 12(b)(6) motion into a motion for summary judgment." 2A James Wm. Moore, *Moore's Federal Practice* p 12.09[3] (2d. ed.1996).
>
> Moreover, holding as Norfolk urges would undermine one of the critical features of the conversion provision of Rule 12(b)(6). If a

> motion to dismiss supported by extraneous materials automatically converts to a summary judgment motion upon service, the discretion Rule 12(b)(6) vests in the district court to determine whether or not to "exclude" matters outside the pleadings would be eliminated. *Id. See e.g., Wilson-Cook*, 942 F.2d at 247; *Keeler v. Mayor & City Council of Cumberland*, 928 F.Supp. 591, 594 (D.Md.1996); *Walker v. Tyler County Comm'n*, 886 F.Supp. 540, 542 n. 1 (N.D.W.Va.1995).

Here, the Defendants below filed a paper entitled "Motion to Dismiss, or, in the alternative, Motion for Summary Judgment". Attached to the foregoing motion were two affidavits affirming that Mr. DiCarlo (Plaintiff below) had been neither fired nor demoted. But no such complaint had ever been made by Mr. DiCarlo, and thus the affidavits did not controvert the pleading. The district court then determined the motion by applying expressly the standard for F.R.Civ.P. 12(b)(6) motions. Having previously presented for filing a F.R.Civ.P. 41(a)(1)(i) notice, which the district court orally directed the clerk not to accept for filing, Mr. DiCarlo presented a further F.R.Civ.P. 41(a)(1)(i) notice after the determination of Defendants' motion, but before they filed an answer. The district court "denied" the F.R.Civ.P. 41(a)(1)(i) notice and ordered undersigned counsel to show cause why he should

not be sanctioned and referred to the court's Disciplinary Committee (of which Judge Garbis is a member). Petitioner Fallin responded by filing on March 14, 1997, a verified explanation confirming his belief that *Wilson-Cook*, *supra*, [9] compels the conclusion that the F.R.Civ.P. 41(a)(1)(i) notice was effective to terminate the litigation. As of this writing, the District Court has never revisited its show cause order.

Petitioner DiCarlo's argument for mandamus relief is that the actions of the district court were so extreme that traditional appellate review is inadequate to repair the damage inflicted by his treatment in that court. Indeed, what is surely required is a resounding repudiation of the district court's rule 41(a)(1)(i) jurisprudence: to eliminate the possibility of any future interference with the Clerk's acceptance of legitimate papers presented for filing, and to insure adherence to the Fourth Circuit's controlling precedents, *Wilson-Cook* and *Finley*, both *supra*. An abstract, perhaps sanitized reversal one to two years after the fact does not insure that outcome.

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[9] *Wilson-Cook* had been cited and quoted in a footnote in the first notice of voluntary dismissal, presented for filing on November 3, 1995, but rejected by the Clerk at the (oral) direction of Judge Garbis. * * *

Conclusion.

For the foregoing reasons, Petitioners urge that this Court issue its writ of mandamus or, in the alternative, it writ of certiorari to reverse or vacate the Fourth Circuit's denial of all relief.

GLEN M. FALLIN, *pro se*
550M Ritchie Highway, Ste. 130
Severna Park, MD 21146
410-465-3382
and
ROBERT DiCARLO, *pro se* [10]
2517 Maple Road
Baltimore, MD 21219
410-388-9607

[10] Petitioners intend to arrange for representation of Mr. DiCarlo by an attorney admitted to this court.

UNITED STATES DISTRICT COURT
OFFICE OF THE CLERK
DISTRICT OF MARYLAND

Frank L. Monge
Clerk

4415 U.S. Courthouse
101 W Lombard Street
Baltimore, Maryland 21201
(410) 962-2303

Dear Member of the Bar:

The United States District Court for the District of Matyland has adopted a new policy requiring members of its bar to renew their membership every three years. The triennial renewal fee is $25.00.

Enclosed please find an admissions renewal application for completion. Please take particular note of Local Rules 7111.1.a and 701.1.b. Rule 701.1.a requires that in order to be a member of the bar of this court, a lawyer must be a member the bar of the Maryland Court of Appeals or of the highest court of the state (or the District of Columbia) in which he or she maintains his or her principal law office. Rule 701.1.b bars an attorney (other than a member of the Maryland bar) from being a member of the bar of this court if he or she is a member of the bar of another district court, such as the Eastern or Western Districts of Virginia, that discriminates against members of the bar of this court.

This renewal process is based on a monthly mailing to attorneys who have been admitted to practice within a specific month and year. This method, developed by the court, will enable the Clerk's office to manage the process

and systematically notify each attorney eligible for renewal on a regularly scheduled basis.

Please do not copy or distribute this notice to other members of the Federal Bar. Renewal notices that are returned by attorneys outside of or beyond the monthly mailing cycle could cause errors or redundancies in future renewal mailings.

Additionally, please carefully review and complete each section of the application and certification portion of the form as well as the questionnaire on the reverse side. In order for our records to accurately reflect your admission to this court, it is essential that the form be thoroughly completed.

Please return the completed renewal application and your check in the amount of $25.00 made payable to "Clerk, United States District Court" within 30 days of receipt of this letter to Clerk, U.S. District Court, Post Office Box 75293. Baltimore, Maryland 21275-5293. Also, for inquiries regarding the renewal notice or program, contact the Admissions Coordinator at (410) 962-2600 ext. 3263 or 3275.

Sincerely,
Frank L Monge

FLM/cfw
Enclosure

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN THE MATTER OF MISCELLANEOUS

CASE NO. 97-166

GLEN FALLIN

ORDER REMOVING ATTORNEY FROM BAR MEMBERSHIP

It appearing that Glen Fallin, has allowed his membership in the Bar of this Court to expire without renewing the same, has been advised that he should renew his membership if he wishes to stay a member of the Bar of this Court and has failed to do so:

It is this 7th day of May, 1997,

ORDERED that Glen Fallin, Esquire shall be stricken from the role of attorneys admitted to practice before this Court.

/s/ J. FREDERICK MOTZ
Chief Judge
UNITED STATES DISTRICT COURT

LAW OFFICES OF
GLEN MARCUS FALLIN
P.O. Box 1513
Westminster, Maryland 21158
301-662-1555 (direct)
410-465-3382 (voice mail only)
Facsimile: 301-662-8181

May 13, 1997

VIA FACSIMILE: 410-962-2698. **[Footnote omitted.]**

HON. J. FREDERICK MOTZ,
Chief Judge
United States District Court
for the District of Maryland
(Northern Division)
U.S. Courthouse
101 West Lombard Street
Baltimore, MD 21201

RE:
Request for vacatur, nunc pro tunc, of order "removing [the
undersigned] from Bar membership".

Dear Judge Motz:

I have received an order signed by Your Honor on May 7, 1997, that directs that I "shall be stricken from the role of attorneys admitted to practice before this court."

Upon receipt of the subject order, I telephoned the Clerk's Office and spoke with Mr. August Cage, who told me that a previous order signed by Your Honor on April 15, 1997, had been mailed, first class, to me at P.O. Box 1513 in Westminster; that order, Mr. Cage told me, directed the

filing of an application for renewal of my membership in the Bar of this court within 15 days or be removed from this Bar. I HAVE NEVER SEEN SUCH AN ORDER, NOR, UNTIL I SPOKE TODAY WITH MR. CAGE, WAS I IN ANY WAY AWARE OF SUCH AN ORDER, and I so affirm under the penalties of perjury and as a (former) officer of this court.

I did receive an undated latter from the Clerk, Mr. Monge, directing me to apply, on the application that was provided with Mr. Monge's letter, for renewal of my admission to the Bar of this court. Because Mr. Monge's letter and the accompanying application raised a number of questions in my mind, I put the matter aside -- not realizing at that time that there was a 30-day period for filing the application -- with the intention of getting some clarification as soon as possible. Unfortunately, I did not revisit this matter -- or realize that I was remiss for failing to do so -- until I received, at approximately 4:30 p.m. today, the order signed on May 7 by Your Honor, which removes me from the Bar of this court. **[Footnote omitted.]**

The receipt of the order prohibiting me from practicing in this court -- as of May 7, presumably -- caused immediate consternation. My first thought was a series of depositions that I had ar

ranged to conduct tomorrow, with deponents traveling to Baltimore from a considerable distance, in a case in which less than 30 days of discovery remains and in which I am the only attorney representing the Plaintiffs. Fortunately, in

this case **[footnote omitted]** State law claims, which parallel the federal claims on which this court's jurisdiction rests, were dismissed without prejudice and filed in the State court, and I was able to secure an agreement with opposing counsel to proceed in the State case with the depositions of these same deponents, and not in the case pending in this court. A little later I realized, with horror, that I had filed a Notice of Appeal on May 8. At this point, I have not had the time to begin to determine whether the Notice of Appeal is viable.

Unfortunately, I am unable to respond to the May 7 order with precision and confidence because I am unable to find any Local Rule that authorizes, particularizes, or even addresses the requirement that members of the Bar of this court renew their membership every three years. **[Footnote omitted.** Indeed, I was unable to determine from the Clerk's Office today whether there is a written order that authorizes the "new policy" [italics supplied] referred to in the above-referenced letter from Mr. Monge. And because I am unable to determine from the application supplied by Mr. Monge how I am to response to certain questions therein, I need additional time in which to prepare and submit my application. **[Footnote omitted.]**

Hon. J. Frederick Motz,
Chief Judge
May 13, 1997
Page &#&

In view of the circumstances and concerns stated herein, particularly my nonreceipt of the April 15 order, I respectfully request that the Order of May 7, 1997, which removes me from the Bar of this court, be vacated, nunc pro tunc, so as to nullify completely the effectiveness of the

Order from the date it issued. I request further to be allowed to respond to the Court's order of April 15, 1997, (directing that I file an application for renewal of membership in the Bar of this court) within 15 days from the date the court acts upon the instant request.

Thank you for your attention in this matter.

Very truly yours,

Glen M. Fallin

GMF:mf

(&\&)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND AND THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

IN THE MATTER OF

GLEN MARCUS FALLIN,

Respondent-Petitioner.

Miscellaneous Case No. 97-166

ROBERT DiCARLO,

Plaintiff - Petitioner,

vs.

BALTIMORE COUNTY, MARYLAND,

and

WESLEY P. MARTIN,

Defendants - Respondents

PETITION FOR WRIT OF MANDAMUS OR PROHIBITION; NOTICE OF APPEAL BY GLEN FALLIN

Petitioners -- Glen Fallin *pro se* and Robert DiCarlo, by Glen Fallin as his attorney -- seek issuance of the appellate court's writ of mandamus or prohibit to restrain the district court's manifestly unlawful and unconstitutional actions, and Glen Fallin notes an alternative appeal. More particularly:

I. Appellate filings:

A. Glen Fallin, pro se, hereby petitions the U.S. Court of Appeals for the Fourth Circuit for issuance of its writ of mandamus or prohibition for review and vacatur of the Order filed in the district court on May 7, 1997, in Miscellaneous Case No. 97-166, striking Petitioner's name from the roll of attorneys admitted to practice in the U.S. District Court for the District of Maryland.

B. In the alternative, Petitioner Fallin appeals to the U.S. Court of Appeals for the Fourth Circuit from the said Order of May 7, 1997. [1]

C. Robert DiCarlo, Petitioner, by Glen Fallin, as his attorney, joins in seeking issuance of the appellate court's writ of mandamus or prohibition to compel the district court to recognize and effectuate Petitioner DiCarlo's F.R.Civ.P. 41(a)(1)(i) notice of voluntary dismissal duly filed in the case of

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[1] Petitioner prefers to proceed on his Petition for Writ of Mandamus but is mindful that, because of the onerous burden upon a mandamus petitioner, this court may prefer to review this matter on appeal. Hence the hybrid nature of the instant paper. Petitioner is advised by the Clerk's Office that copies of the instant paper will be forwarded to the appellate court and that Petitioner will have the benefit of the date of filing hereof in both the appellate and mandamus / prohibition proceedings.

DiCarlo v. Baltimore County, MD., et al., C/A MJG-95-556, in the absence of an answer and after the district court expressly applied the standard for F.R.Civ.P. 12(b)(6) in determining the Defendants' "Motion to Dismiss or, in the Alternative, Motion for Summary Judgment".

II.A. For purposes of the petition for relief in Miscellaneous Case No. 97-166 by way of a writ of mandamus or prohibition, Petitioner submits and affirms the following facts, with references to pertinent authorities:

1. Petitioner Fallin was admitted to the U.S. District Court for the District of Maryland in November, 1978, and continued thereafter, until May 7, 1997, to be admitted to that court and to practice therein.

2. In approximately February, 1997, Petitioner Fallin received an undated letter from the Clerk to the U.S. District Court for the District of Maryland instructing him to apply within 30 days -- on a form supplied with the Clerk's letter -- for renewal of his admission to the court. (True and correct copies of that letter and the application form are submitted herewith as Exhibit 1A and 1B.)

3. Petitioner Fallin reviewed the aforesaid letter from the Clerk and determined, at least preliminarily, that the Local Rules of district court in no way provided for the renewal of admission to the district court. Petitioner Fallin also noted that the application form called for the applicant for renewal of admission to disclose "pending disciplinary proceedings". Because of the pendency of five orders to show cause why he should not be

sanctioned, [2] Petitioner Fallin put aside the matter until he could consider it further, along with the potential impact of the show cause orders. At the time Petitioner Fallin intended to comply with the 30-day filing provision as stated in the Clerk's letter, but neglected to calendar the further inquiry. As a result the matter was not revisited until Petitioner Fallin received the Order of May 7, 1997, striking his name from the roll of attorneys admitted to the district court. A true and correct copy of that order is submitted herewith as Exhibit 2.

4. When Petitioner Fallin received the Order of May 7, 1997, as aforesaid, he inquired of the Clerk's office and was informed that on April 15, 1997, Chief Judge Motz of the district court had issued a letter-order directing

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[2] The initial order was eventually followed by an order assessing a monetary sanction of approximately $500 upon Petitioner. On appeal, a panel of this court declined to review the sanctions order on grounds that there was no judgment on the merits. See, Wheeler v. Anchor Continental, Inc., 622 F.2d 94 (4th Cir. 1980). Another order, among the five, directs Petitioner to show cause why he should not be referred to the court's Disciplinary Committee, and still another order directs that cause be show as to why Petitioner should not be held in contempt, for "falsifying" a certificate of service and a late filing (by one court day) of an opposition to a dispositive motion Petitioner has explained, in a verified response, that the service copy of the Opposition noted the correct date of service and that the erroneous date, which was entered on the original and copies of the Opposition filed with the court, was not the result of a deliberate act or omission by Petitioner. Indeed, it is debatable as to whether Petitioner was even negligent in the submission of a paper bearing the erroneous service date.

Petitioner Fallin to apply for renewal of his admission to the court within 15 days or else it would be assumed the Petitioner Fallin did not wish to remain admitted to the court. Petitioner Fallin had never seen or heard of the April 15 letter-order when he was informed of it by the Clerk's office. A copy of the letter-order that was procured by Petitioner Fallin from the Clerk's office subsequent to his receipt of the May 7 order is submitted herewith as Exhibit 3.

5. Subsequent inquiry by Petitioner Fallin to the Clerk's Office and the informal response of Chief Judge Motz, through his secretary, to a letter from Petitioner Fallin indicate that the district court's practice of requiring attorneys duly admitted to that court to apply for renewal of their admission is being conducted without being authorized expressly or implied by a Local Rule and without any opportunity for public comment as required by 28 U.S.C. 2071(b), although such procedures are at least contemplated, if not actually required, by U.S. Supreme Court, Fourth Circuit, and Eleventh Circuit authorities. See, Frazier v. Heebe, 482 U.S. 641, 645, 107 S.Ct. 2607, 2611, 96 L.Ed.2d 557, 7 Fed. R. Serv. 3d (Callaghan) 1139 (1987); [3] In re G.L.S., 745 F.2d 856 (1984) (attorney admissions to be regulated by local rule, promulgated

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[3] The Frazier court stated:

> We begin our analysis by recognizing that a district court has discretion to adopt local rules that are necessary to carry out the conduct of its business. See 28 U. S. C. §§ 1654, 2071; Fed. Rule Civ. Proc. 83. This authority includes the regulation of admissions to its own bar. A district court's discretion in promulgating local rules is not, however, without limits.

pursuant to 28 U.S.C. 2071); [4]

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[4] The G.L.S. court stated:

> The United States District Court has the authority to deny an attorney's application for admission to its bar when it is not satisfied that he possesses good private and professional character. 28 U.S.C. @ 1654, n1 28 U.S.C. 2071 n2 and Federal Rule of Civil Procedure 83 n3 authorize the adoption of rules for conducting court business and this includes reasonable standards for admission to practice for the court. Local Rule 2 of the United States District Court for the District of Maryland is in keeping with such authority.

----------Footnotes----------

n1 28 U.S.C. 1654:

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by rules of such courts, respectively, are permitted to manage and conduct causes therein. (emphasis added.)

n2 28 U.S.C. 2071:

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure as prescribed by the Supreme Court. (* * *)

n3 Federal Rules of Civil Procedure 83:

6. On the date he received the May 7 order removing him from the bar of the district court, Petitioner Fallin wrote to Chief Judge Motz of the U.S. District Court for the District of Maryland and expressed his concerns about inter alia the lack of a Local Rule to regular the admission-renewal process, the lack of an opportunity for public comment, the lack of published criteria for considering renewal applications, and his concern that the five pending orders to show cause why he should not be sanctioned -- which were and are totally unwarranted and all issued by the same judge [5] -- might be used to bar the renewal of his

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> Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

[5] The Hon. Marvin J. Garbis issued the five show cause orders. Judge Garbis also issued an order removing Petitioner Fallin as counsel in the DiCarlo case, C/A MJG-95-556, and directing that in the event successor counsel failed to enter an appearance or Mr. DiCarlo failed to notify the court by June 12, 1997, that he would proceed pro se, the case would be dismissed with prejudice. According to the Clerk's Office, Judge Garbis one of five judges sitting on the bodhy that reviews the renewal applications. Another member of that body has issued an order removing Petitioner Fallin as counsel in a case filed approximately 60 days ago -- and as yet unserved -- and warning of possible dismissal with prejudice for noncompliance with the requirement to retain new counsel or proceed pro se. Presumably the plaintiff in the latter case can exercise his

admission to the court. In the letter Petitioner Fallin asked Chief Judge Motz to issue a nunc tunc order striking the May 7 order terminating his admission to the court so as to allow him an additional 15 days in which to submit, or decide whether to submit, the renewal application. Chief Judge Motz responded by having his secretary telephone Petitioner Fallin and state that the requested order would be signed when Petitioner Fallin submitted the renewal application. No other concerns raised by Petitioner Fallin in his letter to Chief Judge Motz were addressed. Thus there still is no local rule, no published criteria for considering the renewal applications; no opportunity for public comment has been provided by the court; and the show cause orders entered by Judge Garbis are still pending and still can be relied on to bar renewal of Petitioner Fallin's admission to the court.

7. The right of Petitioner Fallin to practice before the U.S. District Court for the District of Maryland is a property interest that can be extinguished by the district court only if done so with due process of law. In Re G.L.S., supra, 745 F.2d at 859: "'[T]the practice of law is not a matter of grace, but of right for one who is qualified by his learning and his moral character'", quoting from Baird v. State Bar of Arizona, 401 U.S. 1, 8, 27 L. Ed. 2d 639, 91 S. Ct. 702 (1971). [6] The termination of Petitioner Fallin's admission to the district court did not comport with due process, in that it was effected without actual or constructive notice to him of the terms and imminence of the termination of his admission to the court. Because

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F.R.Civ.P. 41(a)(1)(i) right to dismiss without prejudice, but even that is prejudicial, since he would thereby forfeit the right to dismiss again, without preclusive effect.

[6] *Heebe, supra,* was not decided on constitutional principles, but on the basis of the Supreme Court's supervisory authority.

Petitioner Fallin's delay in submitting his renewal application was attributable solely to the district court's failure to provide by Local Rule for renewal of attorney admissions, and that procedure is contemplated or required by the authorities cited above (Heebe, In Re G.L.S., both supra, his delay was justified. Furthermore, the method of attempting to provide notice to Fallin would have been inadequate had it been utilized for obtaining personal jurisdiction by service of original process. See, Miserandino v. Resort Properties, Inc. et al., 345 Md. 43, 62, 691 A.2d 208 (1997) ("Service by first class mail along, with no receipt . . . hardly seems likely to comply with the due process clause"). Surely, with an attorney livelihood at stake, some means of notice more reliable than a first class letter should have been utilized. Also inadequate, Petitioner submits, was the 15 days allowed by Chief Judge Motz for Fallin to act. [7]

II.B. Relief prayed by Petitioner Fallin on his

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[7] Rule 701.1(c) of the Local Rules of the U.S. District Court for the District of Columbia provides as follows:

> (c) Failure to renew. An attorney who fails to file the required certifications and pay the renewal fee shall be provisionally removed from the list of members in good standing. The name of the attorney shall be restored to the list of members in good standing upon filing of the required certificates and payment of the delinquent fee within five years after the due date. At the end of five years from the due date, the name will be permanently removed from the roll, without prejudice to an application for admission as a new member.

petition for writ of mandamus or prohibition:

An order of this court:

A. Vacating of the district court's order of May 7, 1997, terminating the admission of Petitioner Fallin to the U.S. District Court for the District of Maryland.

B. Directing the district court to regulate attorney admissions and renewal of attorney admissions by Local Rule promulgated in accordance with F.R.Civ.P. 83 and 28 U.S.C. 2071, including the requirement of § 2071(b) to allow for public comment, and that such Local Rule provide for adequate and reliable notice to admitted attorneys in jeopardy of having their admission terminated and adequate time for attorneys who fail to apply timely for renewal of admission to be reinstated without undue burden.

C. Directing the district court to take all reasonable steps to restore the status quo that existed prior to the aforesaid order of May 7, 1997, with respect to the right of Petitioner Fallin to represent parties before the U.S. District Court for the District of Maryland (Northern Division), including the issuance of appropriate orders expressly rescinding all orders issued in reliance on the order of May 7, 1997.

D. Such other and further relief as may be deemed necessary and appropriate.

III.A. Facts and authorities in support of relief sought by Petitioner DiCarlo.

1. Petitioner DiCarlo, by Petitioner Fallin as his attorney, submitted on February 24, 1997, a F.R.Civ.P. 41(a)(1)(i) notice of voluntary dismissal: in the absence of an answer by the Defendants and after the court (Garbis, J)

had determined Defendants' "Motion to Dismiss or, in the alternative, Motion for Summary Judgment" by applying expressly the F.R.Civ.P. 12(b)(6) standard and without reliance on an affidavit (or affidavits) submitted by Defendants in support of the motion, since the affidavit(s) did not controvert any averment of the pleadings filed by Petitioner DiCarlo as Plaintiff.

2. On the day following the filing of the aforesaid notice of voluntary dismissal, Judge Garbis faxed to Petitioner Fallin an order to show cause why he should not be sanctioned and a marginal order "denying" the notice of voluntary dismissal.

3. Petitioner Fallin filed on March 13, 1997, a response to the show cause order -- the second issued by Judge Garbis in response to attempts by Petitioner DiCarlo to dismiss voluntarily without prejudice. [8]

III.B. Relief prayed by Petitioner DiCarlo.

An order:

A. Directing the district court to accept and effectuate the Notice of Voluntary Dismissal filed by Petitioner DiCarlo on February 24, 1997.

B. Vacating all show cause orders entered by the district court.

C. Providing such other and further relief as may be deemed just and appropriate.

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[8] The first dismissal notice anticipated that the Defendants motion would have to be treated as a motion to dismiss and the affidavit included therewith disregarded, since the affidavit did not controvert any averment of the complaint. Judge Garbis refused to admit this paper to the record. Judge Garbis also refused to accept an amended complaint, by "interlineation", that struck the Plaintiff's federal claims.

VERIFICATION

I HEREBY CERTIFY under penalties of perjury and on personal knowledge that I am competent to testify to the foregoing and that the foregoing is true and correct.

Date of signature: _____.

_____

GLEN M. FALLIN, pro se, and
Attorney for
Petitioner DiCarlo
P.O. Box 1513
Westminster, MD 21158
301-662-1555 (direct)
410-465-3382 (voice mail only)
FAX: 301-662-8181

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of June, 1997, a copy of the foregoing paper was mailed, first class postage prepaid, to Defendants' attorney: Gregory E. Gaskins, Esq., Assistant County Attorney, Baltimore County Office of Law, 400 Washington Avenue, Towson, MD 21204.

_____

GLEN M. FALLIN, pro se and
Attorney for Robert DiCarlo

Unpublished Disposition

NOTICE: Fourth Circuit Local Rule 36(c) states that citation of unpublished dispositions is disfavored except for establishing res judicata, estoppel, or the law of the case and requires service of copies of cited unpublished dispositions of the Fourth Circuit.

NOTE: THIS OPINION WILL NOT BE PUBLISHED IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

In re Glen Marcus FALLIN and Robert DiCarlo, Petitioners.

No. 97-651.

United States Court of Appeals, Fourth Circuit.

Submitted April 30, 1998.

Decided June 18, 1998.

On Petition for Writ of Mandamus. (MISC-97-166, CA-95-556-MJG).

Glen Marcus Fallin, Columbia, Maryland, for Petitioners.

Before NIEMEYER, LUTTIG, and WILLIAMS, Circuit Judges.

PER CURIAM.

*1 Glen M. Fallin and Robert DiCarlo have filed a petition for a writ of mandamus from this court seeking, inter alia, Fallin's reinstatement on the roll of attorneys admitted to the U.S. District Court for the District of Maryland and an order directing the district court to accept DiCarlo's notice of voluntary dismissal in a civil action. Mandamus is a drastic

remedy to be used only in extraordinary circumstances. See > Kerr v. United States Dist. Court, 426 U.S. 394, 402, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976). Mandamus relief is only available when there are no other means by which the relief sought could be granted, see > In re Beard, 811 F.2d 818, 826 (4th Cir.1987), and may not be used as a substitute for appeal. > In re Catawba Indian Tribe, 973 F.2d 1133, 1135 (4th Cir.1992). The party seeking mandamus relief carries the heavy burden of showing that he has "no other adequate means to attain the relief he desires" and that his entitlement to such relief is "clear and indisputable." > Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 35, 101 S.Ct. 188, 66 L.Ed.2d 193 (1980). Fallin and DiCarlo have not made such a showing. [FN*] Accordingly, we deny the petition for mandamus relief. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

PETITION DENIED

FN* In the alternative, Fallin urges that his petition be considered a notice of appeal of the district court's order striking his name from the roll of admitted attorneys. This construction would not aid Fallin, however. Such an appeal would be dismissed as interlocutory, because Fallin is free to refile his application for admission in the district court. See > Domino Sugar Corp. v. Sugar Workers Local Union 392, 10 F.3d 1064, 1066- 67 (4th Cir.1993) (if defects may be cured by amending complaint or other action, the dismissal of an action is unappealable).

C.A.4,1998.
In re Fallin
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